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No. 88-2031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

MARSHA B. KOKINDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 90 national and international labor organizations with a total membership of more than 14,000,000 working men and women, files this brief amicus curiae with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. In recent years, this Court has applied a tripartite forum analysis to the problem of determining whether a particular governmental regulation on the use of government property for expressive activity is valid or not. Under this analysis, it has been clear that on public streets, pedestrian sidewalks, and parks, communicative activity is presumptively appropriate, and the government is on the shortest regulatory rein. Thus, where

post office entrances abut ordinary municipal sidewalks, as many do, communicative activity, including solicitation of political and charitable contributions, is ordinarily protected by the First Amendment. Although this Court has made clear that this principle is not *limited* to municipal walkways serving the commercial areas of cities and towns, the government now argues that all postal service owned sidewalks abutting the entrance to post office buildings should be declared nonpublic fora, subject to any reasonable, nonviewpoint-based regulation.

This argument should be rejected. The public forum doctrine is based on the recognition that for the robust debate of public issue protected by the First Amendment to take place, individuals without the resources to control or use the private mass media must be able to engage in face-to-face communication with other citizens, in the accessible public areas most suitable for such communication. Thus, public fora are defined not by the government's willingness to permit communication, or by the tradition with regard to the use of any *particular* public property for communication, but by the generic structural and functional attributes of streets, sidewalks and parks that make those places particularly appropriate for communication among citizens. Since the federally-owned sidewalks abutting post office buildings partake of these attributes, there is no basis for abandoning this Court's clear and definite declarations that all sidewalks intended for the use of the general public are public fora.

II. Petitioner also seeks to rely on certain of this Court's recent First Amendment cases for the proposition that if postal service walkways are *not* analogous for First Amendment purposes to streets and parks, then the postal service's right as owner of the property to exclude communicative activity is basically the same as that of private property owners, subject to no First Amendment restriction other than a prohibition on direct viewpoint distinctions. As we demonstrate in Part

II, *infra*, the nonpublic forum cases such as *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 778 (1985) upon which petitioners rely for the private property analogy are of little aid in illuminating the appropriate First Amendment balance in a case of this kind.

Those cases and similar ones are characterized by the circumstances that (1) the government was itself involved in communication-fostering activity; (2) the particular use of governmental property in question involved internal governmental operations, or some other use analogous to a private commercial enterprise; and (3) the issue in the case involved physical access to a means of communication, rather than expressive activity by individuals whose physical access to a geographical location was unquestioned. Where these factors predominate, there are compelling reasons for striking the First Amendment balance in a way that gives deference to governmental decisions about the appropriate use of the governmental-assisted mode of communication.

Where, on the other hand, the government's principal use of a physical location has nothing to do with expression, is "public" in the sense that direct use by the citizenry generally, or some subgroup thereof, is affirmatively encouraged, and unrestricted physical access to the location is permitted, absolute governmental restrictions upon expressive activity entail dangers to First Amendment values analogous to those posed by direct censorship of expressive activity by private parties on private property. Under those circumstances, governmental restrictions on speech must at least meet the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968): any restriction on expression must serve important governmental interests unrelated to the suppression of expression in a manner narrowly tailored to furtherance of the governmental

interest. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984). The postal service's policy in this case is clearly invalid under this standard.

ARGUMENT

Introduction

If the Bowie post office building, like most post office buildings in the past and many still, fronted on a municipally-owned sidewalk in a commercial area of a town, a federal or a municipal regulation specifically prohibiting any form of solicitation for political or charitable contributions anywhere on that sidewalk would violate the First Amendment: [1]

> Prior authorities . . . clearly establish that charitable appeals for funds, on the street . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. [*Schaumberg v. Citizens for Better Environ.*, 44 U.S. 620, 632 (1980).] [2]

[1] For purposes of this brief, when we refer to "post offices" we are referring to the buildings operated by the postal service for the purpose of serving the general public's mailing needs, including the buying of stamps, the mailing of letters and packages, and the picking up of such letters and packages as are not delivered directly to homes and business. We are *not* referring to any premises the postal service may operate exclusively for sorting and transporting the mail, or for administration of the postal service and that is not open to the general public.

[2] This is not to say that a regulation forbidding precisely the conduct of respondents in this case would be invalid. Setting up a table on a public sidewalk could, quite possibly, be forbidden by a neutral regulation against setting up *any* sizeable stationary object on a public sidewalk. Such a regulation would be neutral with respect to expression; would affect the manner of communication but not in any respect its content, and would therefore allow communicating precisely the same message to precisely the same audience; and would serve a legitimate governmental interest in keeping the full width of the sidewalks open for pedestrians. Under this Court's precedents such a neutral regulation could be viewed as a valid time, place and manner restriction upon expression. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984); *United States v. Albertini*, 472 U.S. 675, 689 (1985). *Cf. City of Lakewood v. Plain Dealer Pub. Co.*, —— U.S. ——, 108 S. Ct 2138, 2147 (1988); *id.* at 2156 (White, J., dissenting) ("There is a First Amendment right to sell books, but we would not accept an argument that a city must allow a book seller to construct a book shop—even a small one—on a city sidewalk. The right to leaflet does not create a right to build a booth on city streets from which leafletting can be conducted."

The postal service, presumably, could also pass such a limited regulation with respect to its property but has not done so, and in no way relies in this case upon the fact that the solicitation was accomplished by setting up what is in effect a temporary sales booth on public property.

See also, e.g., Jamison v. Texas, 318 U.S. 413, 416 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The government does not directly contest, and at points appears to assume, the proposition that such a ban would be invalid with respect to solicitation near the entrance to a post office building fronting upon a regular, municipal street. Brief for the United States ("U.S. Br.") at 21-22; Pet. App. 7a. Instead, the government's submission in this case turns in the main upon the proposition that there are, for First Amendment purposes, two kinds of post offices in this country.[3] Where the public

[3] Aside from the primary argument, based on the ownership and configuration of the property in question, the government also maintains, briefly, that even if post office walkways such as the one here in question were considered public fora, the solicitation regulation could be sustained as a time, place, and manner restriction. U.S. Br. at 33-39.

We do not separately address this contention in text for the following reason. As we show in Part II of this brief, tested against the "four-factor standard of *United States v. O'Brien*, 391 U.S. 367 (1968) for validating a regulation of expressive conduct" (*Clark v. Community for Creative Non-Violence*, 468 U.S. at 298), the postal service's solicitation regulation, as applied to pedestrian walk-

enters the post office building directly from a municipally-owned public walkway, a broad solicitation regulation applicable to the area abutting the entrance way is presumptively invalid; but where the post office entrance abuts a walkway owned by the postal service itself and is in some way set off from ordinary municipal sidewalks, that same regulation becomes entirely valid.[4]

It is plain that this differentiation could not possibly be sustained on the basis of any difference in either the First Amendment interests of solicitors or the asserted governmental regulatory interests. In either case, the First Amendment interests of solicitors inhere in the desire to communicate with fellow citizens at a location in which a wide variety of people congregate, and in which those passing by will be able to stop long enough, if they so desire, to receive and react to the message. And the interests in banning solicitation which the postal service

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ways outside post offices, is invalid. The *O'Brien* standard "in the last analysis is little, if any different from the standard applied to time, place, or manner restrictions." *Id.*; *Ward v. Rock Against Racism*, —— U.S. ——, 109 S. Ct. 2746, 2757 (1989). Thus, for the same reasons that the postal service solicitation regulation fails the *O'Brien* test, *see* pp. 20-28 *infra*, the regulation is not a valid time, place and manner restriction.

[4] Although we refer in this brief to "municipally-owned" sidewalks to denominate those sidewalks long held to constitute public fora for expressive purposes, it is clear, because this Court has so held, that there is no First Amendment significance in which level of our complex government, federal, state, or municipal, holds title to the walkway in question. *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.) (emphasis supplied) ("*wherever* the title *of* streets and parks may rest" they are traditionally available for First Amendment purposes); *United States v. Grace*, 461 U.S. 171, 181-82 (1983). Again, the government in this case does not directly contend otherwise; rather, the government contends that there is some critical difference in configuration or function between the sidewalks surrounding this Court and those surrounding the Bowie post office which justifies *greater* restrictions on First Amendment activity around the post office.

here articulates would be equally applicable with respect to a post office building directly abutting an ordinary municipal sidewalk: Entrance way congestion (U.S. Br. at 26), to the extent it is likely, is, if anything, more likely to occur on a multiple-use walkway. Similarly, assuming for the moment that preventing such delay and annoyance as may occur due to face-to-face solicitation is a legitimate governmental interest (U.S. Br. at 26-27), that interest is at least equally implicated by solicitation on municipal sidewalks generally, and on such sidewalks adjoining post offices particularly. Finally, the asserted interest in maintaining an aesthetically pleasing postal service outlet, competitive with other delivery services (U.S. Br. at 27-28), is again one which is equally present regardless of the post office building's precise configuration.

The government insists, however, that there *is* nonetheless a determinative difference between traditional post office buildings, abutting ordinary municipal sidewalks, and those post office buildings in which the entrance abuts a walkway owned by the postal service and serving only the post office. That difference, it is suggested, flows from this Court's tripartite forum analysis: The postal service, the government claims, has dedicated its walkways to limited pedestrian use in some sense so different from the dedication of ordinary sidewalks to the flow of pedestrian traffic that the First Amendment law applicable to sidewalks in general has no application here. We begin our refutation of the government's position by reviewing this Court's forum analysis, both generally and as applied in particular to sidewalks open to the public.

I. Postal Service Walkways As Public Fora

A. Because this case concerns restrictions on free expression in an area which is maintained by the government for the use of the public and to which the public

has access, the problem presented by the case falls into an area this Court has in recent years dealt with through a tripartite "forum" analysis, summarized in *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572-73 (1987):

> In balancing the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity, the Court has identified three types of fora: the traditional public forum, the public forum created by governmental designation, and the nonpublic forum. *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45-46 (1983). The proper First Amendment analysis differs depending on whether the area in question falls in one category rather than another. In a traditional public forum or a public forum by government designation, we have held that First Amendment protections are subject to heightened scrutiny: "In these quintessential public forums, the government may not prohibit all communicative activity. . . . the State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." We have further held, however, that access too a nonpublic forum may be restricted by government regulation as long as the regulation "is reasonable and not an effort to suppress expression merely because officials oppose the speaker's views." *Id.* at 46 . . . .

Identifying in this typology the standards applicable to the present case is, one would think, a relatively simple matter. While there have been doctrinal difficulties in applying the tripartite forum approach to various kinds of government property, the one given in this area has been that "streets, sidewalks, and parks, are considered, without more, to be 'public forums'." *United States v. Grace*, 461 U.S. 171, 177 (1983). The Court has uniformly viewed streets and sidewalks as traditional public

fora, where "the government's ability to permissibly restrict expressive conduct is very limited" (*id.*), whether those streets and sidewalks abut schools (*Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972)), the United States Supreme Court (*United States v. Grace, supra*), or foreign embassies (*Boos v. Barry*, —— U.S. ——, 108 S. Ct. 1157 (1988)). In all of these instances, the location of the street or sidewalk may well be relevant in determining the validity of any time, place and manner restriction. *See, e.g., Grayned, supra*, 408 U.S. at 116.[5] But this locational factor has never been held to determine whether or not public forum standards apply to all:

> Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historical character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. [*United States v. Grace*, 461 U.S. at 180.]

This Court had occasion to apply these principles in *Frisby v. Schultz*, —— U.S. ——, 108 S. Ct. 2495 (1988). The initial question in *Frisby* was whether the validity of certain kinds of picketing on public streets in residential neighborhoods is to be analyzed on the basis that the streets are traditional public fora or, instead as the city in that case argued, on the basis that residential streets are nonpublic fora dedicated to tranquility, privacy, and repose and therefore not "by tradition or designation held open for public communication." 108 S. Ct. at 2500.

In responding to the city's argument, this Court first noted that

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[5] "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would."

> Ordinarily, a determination of the nature of the forum would follow automatically from this identification: we have repeatedly referred to public streets as the archetype of a traditional public forum. . . "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmark of a traditional public forum. [108 S. Ct. at 2499.]

This Court then rejected the invitation to divide streets and sidewalks used by the public in daily life into subcategories for First Amendment purposes:

> [O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliche" but recognition that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. CIO*, *supra*, 307 U.S., at 515 . . . (Roberts, J.) No particularized inquiry into the precise nature of a specific street is necessary; *all public streets are held in the public trust and are properly considered traditional public fora.* [108 S. Ct. at 2500 (emphasis supplied).]

B. Despite the seeming clarity of this Court's pronouncements upon the public forum status of streets and sidewalks generally, the government nonetheless maintains that by configuring its post office buildings to be noncontiguous with other commercial buildings, surrounding the buildings with publicly-owned parking lots, and constructing walkways to the entrances to the buildings so that pedestrians are likely to use each walkway only to enter one particular building, the government can effectively deny citizens the opportunity to communicate with each other in a prime location where they traditionally carry out their daily routines. The consequence would be to allow the postal service not only to regulate solicitation activity on walkways abutting post offices, but to declare those areas off limits, entirely or on a content-selective-basis, to *any* form of communication. *Perry Ed.*

Assn. v. Perry Local Educators Assn., 460 U.S. 37, 45-46 (1983). Moreover, since the government's argument cannot and does not turn upon the fact that the particular walkways in question are owned by the federal, rather than a municipal, government (*see* n.4, p. 6, *supra*), there is no reason why municipalities as well, by constructing their streets and sidewalks in some less traditional fashion, could not claim that the traditional public forum principles no longer apply.

To evaluate the government's approach, it is helpful to begin by recalling some very basic propositions about the purposes of the First Amendment generally, and the public forum doctrine particularly. As this Court recently had reason to note:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "The freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but is also essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). We have therefore been particularly vigilant to ensure that individual expression of ideas remains free from governmentally imposed sanctions. . . . As Justice Holmes wrote, "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace. . . ." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion). [*Hustler Magazine v. Falwell*, — U.S. —, 108 S. Ct. 876, 879 (1988).]

Hustler Magazine involved, as the name indicates, "a magazine of nationwide circulation." 108 S. Ct. at 877.

It has long been understood, however, that "the common quest for truth and the vitality of the society as a whole" (*id.* at 879), cannot be assured simply by preserving the right of those with control over, or access to, the private media to use those media free of censorship. This Court has been careful, as well, to safeguard the free speech rights of individuals without access to modern society's more complex communication modes. In this regard the Court has recognized that

> The right to freedom of speech cannot exist in the abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow. [Stone, *Fora Americana; Speech in Public Places*, 1974 Supreme Court Rev. 233, 245].

For example, in *Schneider v. State*, 308 U.S. 147 (1939), the Court protected the right of religious and political minorities to distribute pamphlets and other literature either to passersby generally or by going door to door in residential neighborhoods. In explaining its decision, the Court invoked the most fundamental First Amendment principles:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities,

> but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of the democratic institutions. [308 U.S. at 161; footnote omitted.]

See also Martin v. City of Struthers, 319 U.S. 141, 147 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.")

It is this solicitude for free speech, particularly the free speech of individuals who have no direct access to the mass media, that animates the public forum doctrine and defines its parameters:

> However many the limitations, a system of freedom of expression is more firmly founded when it rests upon the strongly held premise that a constitutional right to use the streets and open places is the starting point from which discussion of limitations begins. [T. Emerson, *The System of Freedom of Expression* (1970) p. 304.]

The question then becomes how this "[t]raditional public forum property [that] occupies a special position in terms of First Amendment protection" (*United States v. Grace*, 461 U.S. at 180) is defined and delimited.

First, it is clearly *not* the case that the application of the public forum doctrine turns, as supposed by the government in this case, upon whether, on either a case-by-case or generic basis, *particular* types of sidewalks "traditionally [have been] dedicated to the public exercise of First Amendment rights" or "have [a] strong and established history of regular use" as a quintessential public forum. U.S. Br. at 17. From its inception, the public forum concept has not turned upon either the largesse of the local government or whether the particular protester, picketer, solicitor or handbiller seeking to communicate is the first or the third individual interested in that kind of communication on that specific walkway.

Thus, both Justice Roberts' opinion in *Hague v. CIO*, 307 U.S. 496 (1939), usually identified as the progenitor

of this Court's public forum cases, and its progeny recognize that the areas presumptively available for expressive activity were *not* created for that use, and are in fact principally for other uses: Streets are primarily for transportation and sidewalks for access to particular buildings or for movement from building to building (Schneider, 308 U.S. at 150), while parks are preeminently intended for recreation (*Hague*, 307 U.S. at 505). As a general matter, then, neither streets nor sidewalks nor parks are "designed, built, or designated" as communication facilities.[6]

Rather, it is precisely because governments have repeatedly *refused* to consent to expressive use of streets and parks, and instead have asserted the right to ban such expression freely, that there have been a myriad of cases decided by this Court concerning the prohibition of speech on public streets and parks.[7] By disapproving

[6] *See also, e.g., Schneider*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which streets are dedicated"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement"); *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring) (the issue in cases concerning the dissemination of ideas in public places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks"); *id.*, at 279 ("control of speech in streets and parks draws on . . . considerations [of] protection of the . . . primary uses of travel and recreation for which streets and parks exist.")

[7] *See, e.g., United States v. Grace, supra* (ordinance prohibiting picketing on public sidewalk in front of Supreme Court building); *Carroll v. President and Commissioners of Princess Ann*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana, supra* (prosecution for demonstrating on public sidewalk in vicinity of courthouse); *Jamison v. Texas*, 318 U.S. at 415 (ordinance embodying city's view "that it has the absolute power to prohibit the use of the streets for the communication of ideas");

these prohibitions, this Court has confirmed its view that "freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969). And consistent with the view that public forum designation is not consensual, this Court has maintained that the public forum status of property is nondefeasible; "the government [may not] transform the character of property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *United States v. Grace*, 461 U.S. at 180.

Nor can the language of "tradition" in *Hague, supra*, and its progeny be read as a sort of adverse possession rule, permitting expressive activity only on those particular streets and parks in which similar activity happens to have occurred before. The public forum doctrine, as we have seen, is fundamentally concerned with assuring the availability in every locale of appropriate public areas in which communication among citizens can take place; it would make no sense for that availability for one individual or group to turn upon whether some other individuals with similar purposes had earlier seen fit to use the same location. Instead, the tradition referred to in the public forum cases is a generic one, based upon the common structural and functional elements which make streets, sidewalks and parks "natural and proper places for the dissemination of information and opinion." *Schneider*, 308 U.S. at 163.

As a result, the quintessential public forum doctrine serves in effect as a minimum *guarantee* that citizens can

Schneider, supra (same); *Hague, supra* (ordinance denying right to hold public meetings in public streets and parks); *Davis v. Massachusetts*, 167 U.S. 43 (1897) (ordinance forbidding public speaking in park).

discuss with each other face-to-face matters of mutual concern in public locations with certain characteristics and that such communication among citizens is a use that must be accommodated in a hospitable fashion, along with the other uses of the location. While that accommodation may include some limited measure of inconvenience or annoyance to those using the location for non-speech purposes, the locations regarded as quintessential public fora are such that even with accommodation for speech purposes, the fundamental use of the area for the government's other purposes can be preserved. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); *Perry Ed. Assn.*, 460 U.S. at 45.

C. The elements common to the public areas where free speech must be accommodated in order to conserve First Amendment values were described by this Court in *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 651 (1981):

> A street is continually open, often uncongested, and constitutes . . . a necessary conduit in the daily affairs of a locality's citizens.

This description certainly fits sidewalks generally, and the postal service sidewalks at issue in this case particularly.

First, sidewalks are ordinarily "continually open" both in the sense of being outdoors but, more to the point, in the additional senses that freedom of access by any member of the public is essential to their basic function as arteries of transportation and communication, and that a wide range of activity is continuously permitted. In this instance, for example, the sidewalks in question serve to provide access to a building that is itself a center for communication among all people, locally, nationally, and internationally. Thus, free accessibility by the public is not simply a question of grace by the public officials in

charge of the location, but is inherent in the nature of the location.[8]

The primary result of this "openness" is that streets and sidewalks are locations in which at least some communicative activities can be accommodated simply by applying the communication-neutral rules used to accommodate other activities normally pursued on the property. For the most part, on streets and sidewalks, includ-

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[8] This factor serves fundamentally to distinguish the *only* two instances in which this Court has held that outdoor walkways on public property were not, for First Amendment purposes, quintessential public fora. *Adderley v. Florida*, 385 U.S. 39 (1967); *Greer v. Spock*, 424 U.S. 828 (1976).

Adderley involved access to the grounds of a *jail*. While it is unclear to what degree the general public was formally barred from those grounds (*compare* 385 U.S. at 41 (the demonstrators entered the jail grounds through driveway used only for jail purposes) *with id.* at 52 (Douglas, J., dissenting) (the government "does not claim that the public was generally excluded from the grounds")), it is plain, just from the nature of the place, that public access was not central to the *function* of the location, and, indeed, that because "jails [are] built for security" (*id.* at 41), the jail authorities necessarily retain the right to exclude any member of the public on the basis of security needs.

Greer v. Spock concerned the use for expressive purposes of streets and sidewalks on a *military base*. While the public was freely permitted to visit the base, its essential function was not, of course, to facilitate public communication, interchange, or transportation in any sense, but "to provide for the common defense." U.S. Const., Preamble, *quoted* 424 U.S. at 837. As such, the authority to exclude from the base not only those engaged in expressive activity, but *anyone* deemed by the commanding officer to be detrimental to the defense function is "historically unquestioned." *Id.* at 838.

Thus, in both *Adderley* and *Greer v. Spock*, the interests served by limiting the expressive use of the property were special security interests, quite different from the governmental interests in the streets and sidewalks generally. Here, in contrast, the governmental interests asserted by the postal service are, as we have seen (pp. 6-7, *supra*), precisely the *same* interests in basic crowd control and orderliness applicable to streets and sidewalks in general.

ing single-purpose sidewalks such as this one, communication between citizens can be promoted simply by applying the principle that "one who is rightfully on the street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. at 416.[9]

Consequently, simply by not discriminating *against* all or some communication, government can do all that needs to be done to assure a variety of expressive activity on public walkways. Indeed the postal service regulation here recognizes that modes of communication such as handbilling, petitioning, and oral proselytizing are fully compatible with the location, for those forms of expression are allowed. U.S. Br. at 3.

The second, related element underlying the designation of sidewalks as quintessential public fora is that a street, including a postal service walkway is "a necessary conduit in the daily affairs of a locality's citizens." As a consequence, a sidewalk is an area in which there is likely to be an audience for communication, and where there may well be at least some individuals with the time and inclination to consider any ideas communicated. Moreover, by choosing the particular sidewalk on which

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[9] In limited circumstances the public forum doctrine encompasses, in addition to this nondiscrimination rule, some governmental obligation to permit expressive activity even when it would be legitimate to ban individuals without any expressive intent from use of the forum because of the disruption that would be caused. For example, parades do stop the flow of traffic, and presumably a city could arrest as rioters large groups of people who swarmed onto the street stopping traffic without any communicative purpose. Nonetheless, while the right to engage in large group demonstrations in the streets may be tightly restricted (*Cox v. New Hampshire, supra*), it does not appear that parades may be forbidden entirely. *Gregory v. City of Chicago*, 394 U.S. 111 (1969). *See generally* Kalven, *The Concept of the Public Forum*, 1965 Supreme Court Rev. 1.

his expressive activity is to be conducted, a speaker can focus his communication upon those he most wants to convince of his message, thus avoiding the wasteful dispersal of the message to uninvolved and unconcerned listeners. Further, by definition, sidewalks are available over a wide geographic area, since there must be access to nearly every place that people live and work. Consequently, designating sidewalks in general as public fora means that a fairly wide choice of locations for communication is available without the need to open up a wide variety of other government-owned areas as well.

Post office entranceways, whether on ordinary municipal sidewalks or postal service-owned specialized walkways, are by definition areas where a wide cross section of individuals are likely to pass by at one time or another. And there are post offices serving every town and village, nationwide. If the government's submission were to be accepted, the opportunity to communicate at these natural locations for free speech would vary from town to town depending on such irrelevant details as the nature of the parking arrangements or the number of buildings that can be reached from a single walkway.

In short, postal service walkways like other sidewalks are admirable places for fulfilling the purpose of the public forum doctrine: assuring a place for communication between ordinary citizens on important issues, in pursuit of the First Amendment's large goals, while involving the government as little as possible in supervising and regulating the right to speak one's mind. That being so, this Court should reaffirm in this case its longstanding and oft-repeated principle that on public sidewalks serving as conduits for pedestrians, "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. at 177.

II. Even if Sidewalks Abutting Post Offices Are Not Necessarily Quintessential Public Fora, A Total Ban On Solicitation on those Sidewalks Is Invalid.

A. The government maintains that the walkways in question are not quintessential public fora, but under this Court's tripartite forum analysis, are "nonpublic fora" which the government "may reserve . . . for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Ed. Assn.*, 460 U.S. at 46. As the Court has noted, however, the tripartite forum typology is only "a workable analytical tool" (*City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984); *viz.*, a "means of determining when the Government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes" (*Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 778, 800 (1985)). In effect, the tripartite forum typology simply states in a shorthand fashion the *result* reached through a process of balancing First Amendment interests against nonspeech governmental interests in a certain class of situations.

Because forum doctrine is at bottom a summary of this Court's conclusions regarding the degree of First Amendment protection accorded in certain paradigm situations, "in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, by tradition or recent convention, for the use of citizens at large", the forum analysis is unlikely to be a helpful means of arriving at the right answer. *Taxpayers for Vincent*, 466 U.S. at 815 n.32. Thus, in that and other recent cases the accommodation between First Amendment interests and the governmental interest in control of public property has been subject to explicit balancing under generally applicable First Amendment standards, treating the

governmental interest in control of the taxpayers' property as a state interest no different from any other neutral state purpose asserted to countervail the communicative concerns of certain citizens.

Taxpayers for Vincent thus applied a standard derived from *United States v. O'Brien*, 391 U.S. 367 (1968); *viz.*, whether the regulation in question furthered an important or substantial governmental interest, unrelated to the suppression of free expression, in a manner not "substantially broader than necessary to protect" the governmental interest at stake. 466 U.S. at 808.[10] A threshold question here is whether this is a case in which the shorthand balancing approach of the nonpublic forum doctrine is appropriate or whether, instead, the circumstances of this case are sufficiently dissimilar from those in which the nonpublic forum standards were developed to require more direct and careful attention to the precise nature of the government interests and of the expressive activity at issue.

In deciding that question, it is useful to bear in mind several considerations concerning the appropriate reach of the nonpublic forum standard. First, the oft-repeated truth that government "no less than a private owner of property has power to preserve the property under its control for the use for which it is lawfully dedicated" (*Greer v. Spock*, 424 U.S. at 836) does not mean that bare control of government property, as such, is a governmental interest entitled to protection. In contrast with private property ownership, public ownership has no constitutional dimension. *Cf. Hague, supra*, rejecting the rule of *Davis v. Massachusetts, supra*. Rather, the government owns and controls property in pursuit of various

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[10] The Court in *Taxpayers for Vincent* was unanimous in holding that this was the applicable standard, although three members of the Court disagreed with the application of that standard to the particular circumstances. 466 U.S. at 818 (Brennan, J., dissenting).

discrete governmental purposes, ultimately on behalf of the citizenry at large. Since those purposes vary widely, the nature and strength of the governmental interest in control of its property does not have a unitary quality, but varies widely as well.

It is nonetheless true that "[*a*]*t some point*, the government's relationship to things under its domininion and control is virtually identical to a private owner's property interest in the same kinds of things." *Taxpayers for Vincent*, 466 U.S. at 814 n.31 (emphasis supplied). That point is approached, for example, where the particular use of property involved provides no direct service to the public but, instead, functions as a means of enabling the government to carry out its internal operations. Thus, to cite the example given by *Taxpayers for Vincent*, city-owned automobiles may be essential to permit the government to function, but, unlike buses, streets, or airline terminals, the public at large has no right to use government automobiles directly for any purpose, expressive or otherwise. As to such property, there is a strong case for allowing the government an efficient, unrestricted use parallel to that permitted private enterprises engaged in parallel operational and administrative tasks.

As this last point suggests, there is a major difference, albeit not necessarily a controlling one, between locations as to which physical access is freely available to the citizens claiming the right to engage in expressive activity, and areas or modes of communication as to which the claimed First Amendment right is physical access which is otherwise denied. In the former case, even private parties have attenuated property interests, and can be required to permit communicative activity by individuals otherwise validly present. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Compare Republic Aviation v. Board*, 324 U.S. 793 (1945) *with Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1955); *see Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976)

(characterizing the distinction between an employer's interest in restricting physical access to its plant by strangers to the enterprise and the interest in limiting the communicative activity of those otherwise validly present as "one of substance"). And to permit individuals to use governmental facilities only on the ground that they refrain from certain communicative activities necessarily implicates censorship-like concerns not raised where physical access is totally denied: Engaging in some mode of communication is an integral part of many human activities that take place when individuals are on public property as well as elsewhere; thus a decision to limit communication by individuals already on government property is akin in its effect on speech interests to government censorship of the same communication when it takes place on private property.

Finally, there are differences of substance between situations in which the government affirmatively acts to facilitate communication or expression between some class of citizens, and those in which the location to which the regulation applies is exactly that: a physical area, and not a "forum" at all in the sense of a medium for transmitting ideas. In the former case, the government is in some sense acting itself to forward First Amendment interests, by providing citizens, albeit only a subgroup thereof, with a means of reaching each other not otherwise available. Moreover, in that situation, the government necessarily has some legitimate interest in such aspects of the communicative activity as its content and the identity of speakers, for those factors basically define the parameters of the voluntary governmental role. Furthermore, an individual seeking access to such a government-controlled specialized speech forum is in reality requesting that the government provide him with assistance in reaching an audience; in contrast, where the government is not directly assisting speech but simply maintaining a physical location conductive to speech, an individual

who is otherwise allowed on the premises is, in asserting First Amednment rights, asking only that the government not interfere with his speech and not that the government assist his speech.

B. In each case in which this Court has applied the nonpublic forum approach the issue has turned on physical access to a specialized governmental mode of communication. *See Perry Ed. Assn., supra; Cornelius, supra; U.S. Postal Service v. Greenburgh Civil Assn.*, 453 U.S. 114 (1981); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).[11] The governmental mode of communication, by its nature, required that some distinctions be drawn among speakers, and in most instances required direct contact between governmental officials and the speakers. The question was therefore not whether the government should simply leave individuals otherwise validly present alone to engage in expressive activity, but whether the government was required to provide assistance to a broad range of speakers. Finally, the government's activities in each of these instances was in some sense managerial or entrepreneurial, activities with precise parallels in the private sector; *Perry Ed. Assn.* and *Cornelius* involved internal communications with governmental employees, while *Greenburgh Civic Assn.* and *Lehman* involved, in effect, "sale" of valuable opportunities to communicate with a large audience.

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[11] We do not understand *Greer v. Spock, supra,* to come within the nonpublic forum class of cases. Rather, as this Court made clear in the treatment of *Greer* in *Brown v. Glines*, 444 U.S. 348 (1980), the First Amendment analysis in *Greer* did not turn on the nature of the property in question but on a more general First Amendment balancing approach similar to that of *Taxpayers for Vincent*. *See Brown v. Glines*, 444 U.S. at 355 (the regulations in *Greer* "protect a substantial Government interest unrelated to the suppression of free expression"—namely, protection of military discipline—and "restrict speech no more than is reasonably necessary to protect the substantial governmental interest.")

In contrast, even if we are wrong in our contention in Part I, *supra*, that the property here in question falls within the "paradigm[] of government property interest . . . clearly held in trust either by tradition or recent convention for the use of the citizens at large" (*Taxpayers for Vincent*, 466 at 815 n.32), it is at least true that the postal service walkways here are *more* similar to other sidewalks than to internal mail systems, busses, mail boxes, or charity drives, *viz.*, to the situations in which "government property interests essentially mirror[] private interests," (*id.*). For in seeking to use the postal service walkways, respondents are merely asserting that they carry with them there as elsewhere the right to engage in communicative activity that does not interfere with any substantial, speech-neutral governmental interest that cannot be otherwise accommodated; respondents are *not* seeking governmental assistance in communicating, or access to a valuable government-controlled mode of communication.[12]

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[12] As this Court noted in *Jews for Jesus*, 482 U.S. at 573, "at least one commentator contends that [the forum doctrine] does not control a case . . . in which the [speakers] already have access to the [forum], and therefore concludes that such cases are analogous to *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)." Although this Court did not in *Jews for Jesus* resolve the question whether nonpublic forum analysis applies in its entirety to cases in which the would-be speaker is already permitted on the governmental premises, one particularly pertinent recent case suggests that a rule entirely distinct from the forum typology governs instances in which individuals are simply seeking the right to be free of censorship in their expressive activity while validly present on government-owned property.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), this Court first confirmed that, as argued in the text, *there* is a difference between limiting access to a government-sponsored mode of communication and limiting free speech activity by individuals validly present at a government-owned location. In that case, the Court determined at the outset that schools generally are not traditional public fora, and that there was no intent on the part of school

C. This is therefore a case which, looked at most favorably to the government, falls between the "paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust . . . for the use of the citizens at large." *Taxpayers for Vincent*, 466 U.S. at 815 n.32. As such, it is the kind of

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officials to permit indiscriminate use of the school newspaper by students. *Id.* at 267-70. The Court therefore held with respect to the school newspaper that "school officials were entitled to regulate the contents of Spectrum in any reasonable manner." *Id.* at 270.

At the same time, the Court maintained that

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonable perceive to bear the imprimatur of the school. . . Accordingly, we conclude that the standard articulated in *Tinker* . . . determin[es] when a school may punish student expression [but is not] the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. [484 U.S. at 270-72.]

Hazelwood School District, then, recognized that even if a govment-owned or controlled location or activity is *not* a traditional public forum, there are still instances in which denials of the right to communicate must be treated, for First Amendment purposes, as analogous to across-the-board censorship and subjected to careful scrutiny, rather than simply to a reasonableness review. Those circumstances, as the reference to *Tinker, supra*, indicates, involve situations in which the individuals seeking to speak are otherwise lawfully present on the property in question, and in which those individuals are not requesting any governmental action fostering speech, but are simply requesting that their communication be judged by the same standards of conduct applicable to those lawfully present on the premises who are not seeking to engage in communicative activity.

case in which public forum analysis does not provide "a workable analytical tool"; and in which the more direct approach to the First Amendment balancing problem used in *Taxpayers for Vincent* is appropriate.[13]

Under that approach, it is clear that the government's regulation banning *all* solicitation on *all* postal service walkways at *all* times cannot stand. First, the solicitation regulation is not a content-neutral restriction, unrelated to the suppression of expression but a *content-based* regulation prohibiting a particular kind of communicative *message*. The regulation, that is, bans *entirely* the message that the respondents seek a charitable contribution rather than permitting the communication of that message in one manner rather than another—by handbilling, for example, but not by picketing (*Frisby v. Schultz, supra*), or by stationary solicitors but not by ambulatory ones (*Heffron, supra*) or in a manner that does not threaten a disturbance, but not that does (*Boos v. Barry, supra*).

Second, as noted, the government regulation bans solicitation *entirely* in the forum in question. Unlike less restrictive regulations, "a complete ban can be narrowly tailored, but only if *each* activity within the proscription is an appropriately targeted evil." *Frisby v. Schultz*, 108 S. Ct. at 2502-03 (emphasis supplied). For example, picketing directed at a single house is inher-

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[13] *Taxpayers for Vincent* did discuss briefly the pertinence of public forum analysis to that case. 466 U.S. at 813-15. However, it is clear that the Court in *Taxpayers for Vincent* viewed the public forum approach as raising a separate issue of whether the nature of the property provided the plaintiffs with *greater* rights than would be available under more general First Amendment doctrine, and not as a substitute for the careful, individualized balancing required by *O'Brien*. 466 U.S. at 813 (characterizing the public forum question as whether, given the nature of the property in question, plaintiffs "occupy a *special position* in terms of First Amendment protection.")

ently intrusive (*Frisby v. Schultz*, 108 S. Ct. at 2503-04)), and the visual blight associated with stringing signs on telephone pole wires is "not merely a byproduct of the activity, but is created by the medium of expression itself" (*Taxpayers for Vincent*, 466 U.S. at 810). But solicitation, without more, is not inherently disruptive, does not necessarily create clutter or crowding, and is not fundamentally inconsistent with a pleasant business environment (as, for example, the Christmas time solicitors outside many downtown department stores attest). *See* U.S. Br. at 36. Rather, any undesirable consequences, to the extent that any eventuate at all, would come about because of the *manner in* which solicitation is conducted, including the number of solicitors, whether they approach pedestrians or wait to be approached, and so on. Because the regulation *bans solicitation entirely* rather than focussing upon the particular conduct deemed harmful, it is "substantially broader than necessary to protect" (*Taxpayers for Vincent*, 466 U.S. at 808) the governmental interest at stake, and therefore invalid.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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